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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 910

BURTON MERCANTILE AND GIN COMPANY, INC.,
Petitioner

v.

W. WILLARD WIRTZ, Secretary of Labor,
UNITED STATES DEPARTMENT OF LABOR, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS. EIGHTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above entitled case on November 17, 1964.

CITATION TO OPINION BELOW

The opinion of the Court of Appeals for the Eighth Circuit in the above case is reported in 338 Fed. 2d 414.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 17, 1964. The jurisdiction of this court is invoked under 28 USCA, Sec. 1254 (1).

QUESTION PRESENTED

Are the employees of the petitioner's gin entitled to a year round exemption from the application of the Fair Labor Standards Act?

STATUTES INVOLVED

The statutory provisions involved are Sections 13 (a) (10) and Section 13 (a) (18) of the Fair Labor Standards Act of 1938 as amended.

STATEMENT

The petitioner, Burton Mercantile & Gin Company, is a family agricultural corporation operating rather extensively in the south end of Jackson County, Arkansas. It is engaged in the production of cotton, rice and soybeans and in the operation of elevators, rice driers and two cotton gins which are the subject of this action. While David Paul Burton is primarily responsible for the operation of the gin at Tupelo, his brother, Owen Burton, is in charge of the gin at Beedeville. The stipulations in this case show that the Burtons have interchanged their employees from place to place as work required so that the gin employees may be assigned to farm work when they are not needed at the gin and farm employees may be assigned to gin work when there is no work to be done in the fields. Not by the wildest stretch of the imagination could Burton's Gin and Store be called a sweat

shop. This simply was not the type of industry that the Fair Labor Standards Act was aimed at.

As Mr. Justice Brown said in a concurring opinion in *Maneja* v. *Waialua,* 349 U.S. 254, 75 Supreme Court 719, at page 731:

> "As I see it, the statutory definition of agriculture describes a major activity which lies beyond the outer limits of the Fair Labor Standards Act. Agriculture is not an exception carved out of the jurisdiction of the act. Congress never proposed to apply the act to agriculture. To any extent that the act impinges upon agricultural activities, those impingements are themselves exceptions to the general freedom that characterizes agricultural employment."

It is the position of the Labor Department that the cotton gin exemption to the Fair Labor Standards Act found in 29 USCA 213 (a) applies to the Burton Gin only between those periods in the year when the first and last bale of cotton has been ginned, and that it does not apply at all to the clerical employees of the gin.

The defendants contend that under Section 13 (a) (10), the Agricultural Exemption:

> "Any individual employed within the area of production (as defined by the Secretary) engaged in handling, packing . . . drying, preparing, in their raw or natural state . . . of agricultural . . . commodities for market . . ."

and Section 13 (a) (18):

> "Any employee engaged in ginning of cotton for market in any place of employment located in a county where cotton is grown in commercial quantities."

gives them a year round exemption for all the gin employees including the clerical employees.

In order to run a cotton gin it is necessary to clean up the gin after the last bale of cotton has been ginned to get all lint and seed out of the gin to prevent the spread of pink boll worms. This clean-up is required by the regulations of the State of Arkansas. This work must of necessity be done after the last bale has been ginned. In addition, it is necessary sometime during the spring or summer to tune up and repair the gin machinery in order that it will be in running shape when the first bale is ginned. Under the interpretation the Administrator of the Wage & Hour Division of the exemptions quoted above this clean-up and tune up work is not exempt. The petitioner urges that the clear intent of Congress's act and amendment was to exempt this work as well as the operation of the gin between the dates of the first and last bale.

The Secretary of Labor sought an injunction against the petitioner in Federal District Court of the Eastern District of Arkansas, which injunction was granted. The judgment of the District Court was appealed to the Eighth Circuit Court of Appeals.

BASIS FOR FEDERAL JURISDICTION

Fair Labor Standards Act, 29 USCA 201, as amended.

REASONS FOR THE ALLOWANCE OF THE WRIT

While this particular exemption of the Fair Labor Standards Act has never before been decided by a Court of Appeals, closely analogous exemptions have been considered by other circuits with results contrary to the holding in this case. In a number of cases in-

volving the fishing industry an exemption very similar to the cotton gin exemption was interpreted as exempting employees during the dormant season; ***Waller*** **v.** ***Humphreys,*** 133 Fed. 2d 193; ***McComb*** v. ***Consolidated Fisheries,*** 174 Fed. 2d 74; ***Mitchell*** v. ***Tradewinds Co.,*** 289 Fed. 2d 278.

The determination of the extent of the application of the cotton gin exemption to the Fair Labor Standards Act is a question which affects every cotton gin in the United States and to a degree the entire agriculture economy of the cotton producing areas. The United States Department of Labor has shown an intention to continue seeking injunctions such as the one in the present case and compelling cotton gin owners to comply with their interpretation of the exemption as approved by the Court of Appeals in this case.

Respectfully submitted,

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APPENDIX

Opinion

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 17,610

BURTON MERCANTILE & GIN COMPANY, INC., *Appellant*

v.

W. WILLARD WIRTZ, Secretary of Labor,
UNITED STATES DEPARTMENT OF LABOR

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS

(November 17, 1964)

Before Van Oosterhout and Mehaffy, Circuit Judges, and Davies, District Judge.

PER CURIAM.

This is an appeal by defendant employer from a judgment obtained by the Secretary of Labor enjoining defendant from violating the minimum-wage, overtime and record keeping requirements of the Fair Labor Standards Act as amended (29 U. S. C. A., Sec. 201 et seq.) with respect to employees at two cotton gins operated by the defendant in Jackson County, Arkansas.

The basic issue presented by this appeal is whether Sect. 13 (a) (10) is applicable prior to the 1961 amendment to the Act and Sec. 13 (a) (18) applicable thereafter exempt

from the minimum-wage, overtime and record-keeping provisions of the act the following classes of employees:

1. Clerical employees at any time.

2. Mechanical employees performing repair and maintenance work at the gins during the dormant season when no ginning is in progress.

Judge Henley, who heard this case without a jury, in a well-considered opinion reported at — F. Supp. —, determined that Sections 13 (a) (10) and 13 (a) (18) exemptions are based upon the activity of the employees with respect to whom the exemption is claimed, not upon the activities of the employer, and that the exemption granted by each of said sections is limited to those employees who were engaged in actual ginning operations during the period for which the exemption is claimed. The court held that clerical workers were not engaged in ginning at any time and that mechanical employees engaged in the repair and maintenance work about the gin plants during the off-season, when no ginning is done, were not engaged in ginning and hence no such employees were exempt from the operation of the act.

All questions raised upon this appeal are fully considered, discussed and correctly resolved in the trial court's opinion. The facts, the pertinent statutes, the administrative interpretation, the supporting authorities and the basis of decision are all well stated by Judge Henley in his opinion. We affirm upon the basis of such opinion.

Affirmed.

Decree

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

September Term, 1964

No. 17,610

BURTON MERCANTILE AND GIN COMPANY, INC., *Appellant*,

v.

W. WILLARD WIRTZ, Secretary of Labor,
UNITED STATES DEPARTMENT OF LABOR.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS

This cause came on to be heard on the record from the United States District Court for the Eastern District of Arkansas, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here Ordered and Adjudged by this Court that the Decree of the said District Court in this cause be, and the same is hereby, affirmed.

November 17, 1964.

Order entered in accordance
with Opinion:—

Clerk, U. S. Court of Appeals
for the Eighth Circuit.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 910

BURTON MERCANTILE AND GIN COMPANY, INC.,
PETITIONER

v.

W. WILLARD WIRTZ, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–2a) is reported at 338 F. 2d 414. The opinion of the district court is reported at 234 F. Supp. 825.

JURISDICTION

The judgment of the court of appeals was entered on November 17, 1964. The petition for a writ of certiorari was filed on February 15, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

767-195—65

QUESTION PRESENTED

Whether the courts below correctly held that petitioner's clerical employees, and its employees engaged in maintenance and repair work during the dormant season, are not "engaged in ginning of cotton" within the meaning of the exemption provided by Section 13(a)(18) of the Fair Labor Standards Act.

STATUTE INVOLVED

The statute involved is the Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended, 63 Stat. 910, 75 Stat. 65, 29 U.S.C. 201, *et seq.* Section 13(a)(18) of that Act provides:

> SEC. 13(a) The provisions of section 6 and 7 shall not apply with respect to * * * (18) any employee engaged in ginning of cotton for market, in any place of employment located in a county where cotton is grown in commercial quantities; * * *

The foregoing section was added to the Act by the Fair Labor Standards Amendments of 1961 (75 Stat. 65). Prior to the effective date of the 1961 Amendments, Section 13(a)(10) of the Act provided:

> SEC. 13(a) The provisions of sections 6 and 7 shall not apply with respect to * * * (10) any individual employed within the area of production (as defined by the Administrator * * *), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products; * * *.

Section 13(a)(10) remains in the Act but the reference to "ginning" was deleted by the 1961 Amendments.

STATEMENT

The Secretary of Labor brought this action to restrain petitioner from continuing to violate the minimum wage, overtime and record-keeping provisions of the Fair Labor Standards Act at its two cotton gins in Jackson County, Arkansas. The employees involved are (1) clerical workers, and (2) manual workers performing maintenance and repair work during the "dormant season" when no cotton is actually being ginned. Petitioner conceded it was not complying with the Act's requirements with respect to such employees, but contended that they were not subject to the Act by virtue of Section 13(a)(18) (and former Section 13(a)(10)), which exempts "any employee engaged in ginning of cotton."

The district court denied the exemption claim, pointing out that petitioner's clerical employees "are not 'ginning cotton;' they are keeping books," and that the mechanical employees "are not 'ginning cotton' while they are repairing and working around the gins during the dormant seasons" (234 F. Supp. at 829). The requested injunction was accordingly issued. The court of appeals, in a *per curiam* decision, concluded that the issues had been "fully considered, discussed and correctly resolved in the trial court's opinion" and unanimously affirmed on the basis of that opinion (Pet. App. 2a).

ARGUMENT

The decision below is in accord with decisions of this Court and of other courts of appeals, and presents no conflict with any relevant decisions. The decision below, also, clearly conforms with the legislative history and the consistent administrative interpretation of the applicable statutory provisions. Further review is unnecessary.

1. The correctness of the rulings below that the maintenance employees are not exempt during the dormant season is confirmed *a fortiori* by this Court's decision in *Maneja* v. *Waialua Agricultural Co.*, 349 U.S. 254. It was there held that the more broadly worded overtime exemption provided by Section 7(c) of the Act for all employees "of an employer engaged in the * * * processing of * * * sugarcane * * * in any place of employment where he is so engaged" did not apply to the maintenance crew in the employer's sugar mill "[d]uring the three-month off-season [when] a complete overhaul and reconditioning is given the entire mill equipment and no processing work is performed" (349 U.S. at 270–271). "Manifestly," as the district court observed in the instant case, "if an operator of a sugar mill is not processing sugar during the mill's dormant periods, a cotton gin operator is not 'ginning cotton' during the gin's off-season, and during that season the gin employees are not 'ginning cotton'" (234 F. Supp. at 830).

The same principle is applicable to clerical workers and other employees not directly "engaged in" the exempted activity. See *Jenkins* v. *Durkin*, 208 F. 2d 941 (C.A. 5), and *Mitchell* v. *Stinson*, 217 F. 2d 210 (C.A. 1).

McComb v. *Consolidated Fisheries Co.*, 174 F. 2d 74 (C.A. 3), cited by petitioner (Pet. 5) as construing an analogous exemption in a manner contrary to the result in the instant case, is readily distinguishable. That case dealt with the former Section 13(a)(5) exemption for workers "employed in" fishery operations. In holding the exemption applicable to all employees in a seafood processing plant, the court concluded that the use of the term "employed in" (rather than "engaged in") indicated an intent to include within the exemption's scope any "employee who is 'employed' in the sense of being hired by an employer rather than in the sense of being engaged in a particular physical activity" (174 F. 2d at 77). The decision was also predicated on the extensive list of activities set out in the fisheries exemption which the court concluded was intended to be "a complete catalog of the activities involved in the fishery industry" (*ibid.*).[1] Upon this ground the decision was distinguished in *Mitchell* v. *Stinson*, *supra*, where the court pointed out that the seafood canning exemption—like the cotton ginning exemption here involved—contains "no such extensive catalogue of activities" (217 F. 2d at 216). The other two decisions

[1] The exemptive language encompassed "any employee employed in the catching, taking, harvesting, cultivating or farming of any kind of [seafood], including the going to and returning from work and including employment in the loading, unloading or packing of such products for shipment or in propagating, processing, marketing, freezing, canning, curing, storing, or distributing the above products or byproducts thereof."

cited by petitioners, *Waller* v. *Humphreys,* 133 F. 2d 193 (C.A. 5) and *Mitchell* v. *Trade Winds Co.,* 289 F. 2d 278 (C.A. 5), dealt with the same broader exemption for fishery employees and are distinguishable on the same grounds.

2. The decision below accords with the legislative history of the statutory language and the long-standing consistent administrative interpretation. The original wording of Section 13(a)(10)—which referred to "any employee * * * engaged in * * * ginning"—was adopted in preference to a proposal in the House to exempt "any person employed in connection with the ginning * * * of cotton" (82 Cong. Rec. 1776), and in the Senate to exempt "cotton ginning and baling, their employers and employees * * *" (81 Cong. Rec. 7886–7887). In view of the particular language adopted, the Wage-Hour Administrator, shortly after the Act's enactment, announced his interpretation that the applicability of Section 13 (a)(10) "depends upon the type of activity engaged in by the particular employee" (Interpretative Bulletin No. 14, issued August 21, 1939, 1942 Wage Hour Manual 415). In a later release addressed to the cotton industry the Administrator specifically stated that this exemption "applies only to those employees who are actually engaged in the specified operations," and that it "will not ordinarily apply to all the employees in your plant, among whom may be office workers, maintenance men and guards, just to mention some non-exempt classes of employees" (Release M–9,

issued February 14, 1947, 1949 Wage Hour Manual 35:56). In 1949, when Congress was considering extensive amendments to the Fair Labor Standards Act, a cotton industry spokesman complained to the appropriate committees of both Houses that the Administrator had interpreted this and another exemption affecting cotton "in a manner calculated to restrict the application of those exemptions to the fewest possible number of persons."[2] Yet, the section was not changed. The exemption for cotton ginning was governed by the congressional declaration that existing administrative interpretations of the Act's provisions which were not inconsistent with the 1949 Amendments, "shall remain in effect" (Section 16(c) of Fair Labor Standards Amendments of 1949, 63 Stat. 920). When Section 13(a)(18) was enacted as a separate exemption provision for "ginning" in 1961 (which had the effect of removing this activity from the "area of production" limitation contained in Section 13(a)(10)), substantially the same language was adopted—"any employee engaged in ginning of cotton." "The substantial reenactment * * * of the provision theretofore construed by the Department is persuasive evidence of legislative approval" of that interpretation (*Brewster* v. *Gage,* 280 U.S. 327, 337;

[2] Statemen of John H. Todd, of the National Cotton Compress and Cotton Warehouse Association, Hearings before the House Committee on Education and Labor on H.R. 2033, 81st Cong., 1st Sess., p. 916, and Hearings before a Subcommittee of the Senate Committee on Labor and Public Welfare on S. 58, *et al.*, 81st Cong., 1st Sess., p. 675.

Helvering v. *Reynolds Co.*, 306 U.S. 110, 114–115; *National Labor Relations Board* v. *Gullett Gin Co.*, 340 U.S. 361, 366).

Finally, the ruling below accords with the settled canon that exemptions from this Act are to be narrowly construed. See *Phillips Co.* v. *Walling*, 324 U.S. 490, 493; *Arnold* v. *Ben Kanowsky, Inc.*, 361 U.S. 388, 392; *Mitchell* v. *Kentucky Finance Co.*, 359 U.S. 290, 295.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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